MOHAMMAD EZAM MOHD NOR *a*

v.

PP

HIGH COURT MALAYA, SHAH ALAM *b*
KN SEGARA J
[CRIMINAL APPEAL NO: 42-22-2002]
15 APRIL 2004

CRIMINAL LAW: *Official Secrets Act 1972 - Sections 8(1)(c), 8(1)(i), 2, 16A - Communicating classified official secrets to unauthorized persons - Prima facie proof - Alleged classified documents unsigned and undated - Certificates by public officer - Certificates dated after alleged commission of offence - Whether any offence committed - Whether defence ought to have been called* *c*

The appellant was convicted of an offence under s. 8(1)(c) of the Official Secrets Act 1972 ('the Act') read with s. 8(1)(i) thereof for directly communicating classified official secrets, namely two classified reports on investigations into alleged corrupt practices of two Ministers, to reporters by way of a press conference on 6 November 1999. It was not in dispute that the reports fell within the second category of official secrets as stipulated in s. 2 of the Act. The facts showed that the prosecution, in an effort, apparently, to comply with the requirement of s. 16A of the Act that the reports, to become official secrets, ought to have been classified by an authorized public officer, had produced two original certificates dated 24 August 2000 under the hand of the late Tan Sri Datuk Mohtar Abdullah, the then Attorney General of Malaysia ('P26 and P27'), certifying that the two reports, attached thereto (P26A and P27A), were official secrets. P26A and P27A, however, were undated and unsigned and no evidence was adduced as to who their author was. Before the appellate judge, questions arose as to the actual date P26A and P27A had become official secrets, and in any case whether, on the facts, the offence could have been committed by the appellant. *d* *e* *f* *g*

Held (allowing the appeal):

[1] The provision of s. 16A of the Act that a mere certification would render conclusive any official document as official secret is inconsistent with the interpretation of official secret in s. 2 of the Act. Section 16A appears to be creating a new category of official secret and making meaningless the official secret under s. 2. A provision such as s. 16A is obnoxious, *h*

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draconian and oppressive. Section 16A is, therefore, void to the extent it is in conflict with s. 2 on the interpretation of official secret. (pp 599 g-h & 600 b-c)

[1a] Notwithstanding s. 16A, the prosecution was duty bound to adduce evidence to support a finding that the two reports referred to in the charge were official secrets before the appellant received them through the post, and had remained so at the date of the press conference on 6 November 1999. This the prosecution failed to do. Inter alia, the certificates did not certify that the report "Laporan Siasatan Badan Pencegah Rasuah terhadap YAB Tan Sri Rahim bin Tamby Chik" was a classified document. The evidential value of such certificates under s. 16A was further weakened when P26 had even rendered, as official secret, the charge sheets issued against Tan Sri Rahim Tamby Chik by the Sessions Court, Melaka. (pp 600 c & 602 a-b)

[2] Assuming that the court was wrong in its ruling that s. 16A was invalid, and the prosecution could therefore rely on P26 and P27 to establish that P26A and P27A were official secrets, still, no *prima facie* case could have been established against the appellant. The certificates were dated 24 August 2000 and so, in the absence of any evidence of the date on which the certified reports became official secrets, the presumption could only be that the date of the certificates, namely 24 August 2000, was the date on which the two official documents became official secrets. This was fatal as the appellant was charged for an offence committed on 6 November 1999. The appellant, clearly, had not committed any offence and his defence ought not to have been called. (p 603 a-c)

[Conviction and sentence set aside; accused acquitted and discharged.]

Legislation referred to:
Emergency (Essential Powers) Ordinance 1970, s. 2(1)
Official Secrets Act 1972, ss. 2B, 8(1)(c), (i), 16A

For the appellant - Raja Aziz Addruse (Zainur Zakaria); M/s Zainur Zakaria & Co & Raja Aziz Addruse
For the prosecution - Vong Poh Fah DPP

Reported by AC Simon

JUDGMENT

KN Segara J:

The appellant, hereinafter referred to as, the accused, faced an amended charge under s. 8(1)(c) read together with s. 8(1)(i) Official Secrets Act 1972 (Act 88) as follows:

> Bahawa kamu pada 6 November 1999, diantara jam lebihkurang 12.45 tengahari hingga 2.00 petang, di suatu persidangan akhbar yang diadakan di No. 101 dan 201, Blok A, Pusat Dagangan Phileo Damansara II, No. 15, Jalan 16/11, off Jalan Damansara, Petaling Jaya, dalam Negeri Selangor Darul Ehsan, sebagai orang yang memiliki suatu rahsia rasmi yang telah kamu dapati bersalahan dengan Akta Rahsia Rasmi 1972 (Akta 88) sepertimana yang disebutkan dibawah seksyen 8(1)(c) Akta tersebut, iaitu laporan-laporan yang telah dikelaskan dibawah Akta Rahsia Rasmi (Akta 88) sebagai "RAHSIA" yang bertajuk:
>
> 1. 'SIASATAN TERHADAP DATO' SERI RAFIDAH AZIZ Y.B. MENTERI PERDAGANGAN ANTARABANGSA DAN INDUSTRI; dan
>
> 2. 'SIASATAN BADAN PENCEGAH RASUAH TERHADAP Y.A.B. TAN SRI ABDUL RAHIM BIN TAMBY CHIK (B1), KETUA MENTERI MELAKA'.
>
> telah menyampaikan secara langsung laporan-laporan tersebut kepada seseorang yang lain daripada orang yang kepadanya kamu diberi kuasa dengan sempurna bagi menyampaikannya, iaitu dengan menyampaikan laporan-laporan tersebut kepada pemberita-pemberita yang hadir di persidangan akhbar yang tersebut di atas, dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah seksyen 8(1)(i) Akta Rahsia Rasmi 1972 (Akta 88).

Under s. 2 Official Secrets Act 1972:

> "Official secret" means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public official appointed under section 2B;
>
> "official" relates to any public service;
>
> "document" includes, ... a document in writing and part of a document:
>
> (a) ...;
>
> (b) ...;
>
> (c) ... ;
>
> (d) ...;

Under s. 2B:

> A Minister, the Menteri Besar or the Chief Minister of a State may appoint any public officer by a certificate under his hand to classify any official document, information or material as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be.

The new interpretation of "official secret", quoted above, was introduced by the Official Secrets (Amendment) Act 1986 (Act 660/1986) with effect from 1 January 1987. Accordingly, there are two categories of official secret. The first category is, any document specified in the Schedule and, any information and material relating thereto. Nevertheless, under s. 2A the Minister may from time to time, by order published in the Gazette, add to, delete from, or amend any of the provisions of the said Schedule. The said Schedule is as follows:

> SCHEDULE
>
> Cabinet documents, records of decisions and deliberations including those of Cabinet committees;
>
> State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;
>
> Documents concerning national security, defence and international relations.

The second category of official secret, is any other official document, information and material (not specified in the Schedule) as may be classified as 'Top Secret', 'Secret', 'Confidential', or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s. 2B.

The first category of official secret may conveniently be referred to as, "Scheduled official secret" and, the second category as, "Classified official secret". It is pertinent to note that "Scheduled official secret", in law, as it stands currently requires no classification or endorsement thereon of the said classification. Any such classification or endorsement appearing on any such documents springs from an abundance of caution. However, in the case of the second category of official secret, that is, "Classified official secret", it is abundantly clear that such official secret must, in law, be classified and, such classification can be done ONLY by the specified persons referred to under the provisions of "official secret" in s. 2, read together with s. 2B. It is plain as daylight that any document not falling within the "Scheduled official secret" or not classified, as provided under the provisions of "official secret" in s. 2, read together with s. 2B, is NOT an official secret.

Now, what is the official secret in respect of which the accused has been charged with? The answer is to be found in the amended charge, exh. P1. The official secret relevant to the charge are, two documents falling under the second category of official secret, that is, official document not specified in the Schedule, but, classified in accordance with the provisions of the law in s. 2. The charge spells out the documents quite clearly as:

> ... laporan-laporan yang telah dikelaskan dibawah Akta Rahsia Rasmi 1972 (Akta 88) sebagai "RAHSIA" yang bertajuk:
>
> 1. SIASATAN TERHADAP DATO' SERI RAFIDAH AZIZ Y.B. MENTERI PERDAGANGAN ANTARABANGSA DAN INDUSTRI; dan
>
> 2. SIASATAN BADAN PENCEGAH RASUAH TERHADAP Y.A.B. TAN SRI ABDUL RAHIM BIN TAMBY CHIK (Bl), KETUA MENTERI MELAKA.

The said two reports, referred in the charge, clearly fall squarely within the second category of official secret.

It is, therefore, incumbent upon the prosecution to establish that the reports, which are the subject matter of the charge, are genuine and have been classified by a public officer appointed by a "certificate under the hand of a Minister to classify any official document" as provided under s. 2B.

The Official Secret (Amendment) Act 1986 also introduced the new s. 16A which reads as follows:

> A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever.

This provision, that a mere certification will render conclusive, as official secret, any official document, information or matter certified as official secret, is inconsistent with the interpretation of official secret in s. 2. Pursuant to s. 16A, it would appear that any official document which had never gone through the process of classification to have the hallmark of an official secret under s. 2, or any document not falling within the Schedule, can instantaneously become an official secret (upon the said certification) even where the Minister has not acted under s. 2A to add to or to amend the provisions of the Schedule, with no recourse to any challenge whatsoever by an accused or any other party, even in a situation where immediately prior to the certification the said document was not an official secret within s. 2.

Common sense and logic must prevail over an absurd provision. Whether a document is an official secret, immediately prior to its certification, can only be established, unequivocally, by evidence adduced by the prosecution.

Section 16A appears to be creating a new category of official secret, and, making meaningless the interpretation of official secret under s. 2. A provision such as s. 16A is obnoxious, draconian and oppressive.

Section 16A is, therefore, void to the extent it is in conflict with s. 2 on the interpretation of official secret. Notwithstanding the provisions of s. 16A, the prosecution must adduce evidence, independent of s. 16A, to support a finding that the two reports, referred to in the charge, were official secret before the accused received them through the post, and, remained official secret at the date of the press conference by the accused on 6 November 1999.

In this case, the prosecution were fully aware of the burden on them to establish that the two reports were official secret. They were conscious it was crucial to their case to establish that the two reports had been classified and, that the classification was in fact by a public officer, appointed by a Minister, under a certificate issued by the Minister to the said public officer to classify any official document. This is manifest when the learned Deputy Public Prosecutor requested for a postponement at the commencement of the hearing before the Sessions Court Judge on 5 June 2000. The notes of proceedings read:

> Tarikh: 5.6.2000
>
> ...
>
> TPR: Hari ditetapkan untuk perbicaraan. Walau bagaimanapun saya terpaksa minta satu penangguhan alasan-alasan adalah sebab ada beberapa saksi saya yang tidak dapat hadir. Satu daripada saksi ini ialah saksi utama saya iaitu Dato' Abdul Gani Patail. Beliau adalah saksi utama sebab beliau adalah orang yang diberi kuasa untuk menkelaskan dokumen-dokumen iaitu sebagai official secret yang berkait dengan dokumen-dokumen dalam kes ini. Dokumen-dokumen ini adalah laporan BPR terhadap Dato' Sri Rafidah Aziz dan Tan Sri Abdul Rahim Thambi Chik. ...

The request for postponement was granted. However, the prosecution never called Dato' Abdul Gani Patail to give any evidence at all, and, neither offered him to the defence at the close of the prosecution's case. Instead, the prosecution produced two original certificates dated 24 August 2000, under the hand of the late Tan Sri Datuk Seri Mohtar bin Abdullah, Peguam Negara, Malaysia. The certificates were marked as exhs. P26 and P27 and, the report annexed to each certificate, was marked exh. P26A and P27A, respectively.

Exhibit P26 reads:

PERAKUAN DIBAWAH

SEKSYEN 16A AKTA RAHSIA RASMI 1972

Pada menjalankan kuasa yang diberikan dibawah seksyen 16A Akta Rahsia Rasmi 1972, saya, Tan Sri Datuk Seri Mohtar bin Abdullah, Peguam Negara Malaysia, dengan ini memperakui bahawa segala maklumat dan bahan yang terkandung didalam laporan yang bertajuk "SIASATAN BADAN PENCEGAH RASUAH TERHADAP Y.A.B. TAN SRI RAHIM BIN TAMBY CHIK (B1) KETUA MENTERI MELAKA" yang disediakan oleh Bahagian Pendakwaan, Jabatan Peguam Negara seperti yang dilampirkan, adalah rahsia dibawah Akta Rahsia Rasmi 1972.

Bertarikh pada 24 Ogos 2000.

Sgd.

(TAN SRI DATUK SERI MOHTAR BIN ABDULLAH)
PEGUAM NEGARA
MALAYSIA.

Attached to the certificate was:

1) A photostat copy of a document entitled, "SIASATAN BADAN PENCEGAH RASUAH TERHADAP Y.A.B. TAN SRI RAHIM BIN TAMBY CHIK (B1) KETUA MENTERI MELAKA". It was paginated 1 to 13 and, at the end of p. 13, were the words "Bahagian Pendakwaan, Jabatan Peguam Negara, MALAYSIA. The author of the document is neither named therein nor has he signed and dated same. The author of this document appears to be unknown to the prosecution.!! Annexed to this document is an annexure, "Lampiran A", referred to in para. 5.3, at p. 12 of the document;

2) Two charge sheets registered in Sessions Court Melaka as:

   (i) arrest case No. 62-61-94

   (ii) arrest case No. 62-62-94

for offences under s. 2(1) of the Emergency (Essential Powers) Ordinance 1970 against Tan Sri Rahim bin Tamby Chik.

The certificate does not even certify that the "laporan yang bertajuk Siasatan Badan Pencegah Rasuah terhadap Y.A.B. Tan Sri Rahim bin Tamby Chik (B1) Ketua Menteri Melaka", is a classified document, or certify that the photostat copy of the report attached to the certificate, is a certified true copy of the original in the custody and control of Jabatan Peguam Negara. Credence and evidential weight for such certificates under s. 16A is further weakened when exh. P26 even renders, as official secret, two charge sheets issued against Tan Sri Tamby Chik by the Sessions Court, Melaka.

Exhibit P27 is almost identical to exh. P26 except that the report, referred to in the certificate, reads "SIASATAN TERHADAP DATO' SERI RAFIDAH AZIZ Y.B. MENTERI PERDAGANGAN ANTARABANGSA DAN INDUSTRI". The annexure to this certificate is only a photostat copy (and not a certified true copy) of a 12 page document, entitled, "SIASATAN BADAN PENCEGAH RASUAH TERHADAP Y.B. MENTERI PERDAGANGAN ANTARABANGSA DAN INDUSTRI DATO' SERI RAFIDAH AZIZ (B1) undated, unsigned and the author unknown. However, there is no charge sheet issued by any court attached to this certificate, exh. P27A.

As already observed, the documents exhs. P26A and P27A are undated, unsigned and the author, unidentified and unknown. On what date did exhs. P26A and P27A become official secrets? There is no evidence as to the date on which these two documents were classified, let alone the fact that there is no evidence that the two documents were classified by an authorised officer. The date an official document becomes official secret is crucial and, an important ingredient of the charge because no offence under the Act can be committed in relation to any official document prior to its effective date of „birth" as an official secret. The prosecution must adduce evidence, beyond a reasonable doubt, the date on which a document became an official secret.

In the case of the first category of official secret (Scheduled official secret), it is beyond dispute that the date it becomes official secret is the very day (date) the said document first comes into existence, which necessarily means either the date of its first creation or, the date it first comes into the custody and control of the Government, in respect of a document created by a person who is not a public officer (that is a stranger to the Government).

However, in the case of the second category of official secret (Classified official secret), an official document assumes the "hallowed" new status of official secret only upon the day (date) it is first classified by the prescribed officer. Therefore, the date of classification must be established by the prosecution, beyond a reasonable doubt.

Assuming I am wrong in ruling that s. 16A is invalid, to the extent of its inconsistency with the definition of official secret in s. 2, and the prosecution can, therefore, rely on exh. P26 and P27 to establish that P26A and P27A are official secrets, it still does not help the prosecution in establishing a *prima facie* case, to warrant the accused to be called upon to enter his defence.

The certificates are dated 24 August 2000. In the absence of any evidence of the date of "birth" of P26A and P27A and the further absence of any evidence of the date on which they became official secrets, it must be presumed that the date of the certificates, is the date on which the two official documents became official secret. In the circumstances, the two reports were "born" official secret on 24 August 2000. This is fatal, as the accused was charged for an offence committed on 6 November 1999, well before the "birth" of the two reports as official secret. In such circumstances, the accused has not committed any offence. His defence ought not to have been called by the learned Sessions Court Judge.

Appeal allowed. Conviction and sentence set aside. Accused is acquitted and discharged.